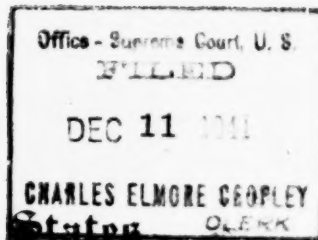




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**Supreme Court of the United States**

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OCTOBER TERM, 1941.

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**No. 19.**

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PHOENIX FINANCE CORPORATION, A CORPORATION  
OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION  
OF THE STATE OF DELAWARE,  
RESPONDENT.

---

**RESPONDENT'S PETITION FOR REHEARING.**

---

FRED A. ONTJES,  
WILLIAM C. GREEN,  
*Counsel for Respondent.*



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VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION  
OF THE STATE OF DELAWARE,  
RESPONDENT.

---

## **RESPONDENT'S PETITION FOR REHEARING.**

Comes now the respondent, Iowa-Wisconsin Bridge Company, and respectfully petitions for a rehearing in the above entitled action upon the following grounds:

### **I.**

In Its Decision Reversing the Decree of the Circuit Court of Appeals for the Eighth Circuit, This Court Inadvertently Overlooked and Failed to Pass upon That Portion of the Decree of the Trial Court, Considered and Affirmed by the Circuit Court of Appeals, Which Required Petitioner to Satisfy, Release and Remove from the Records the \$50,000 Mortgage Referred To in the Litigation, Said Mortgage Being in No Manner Involved in Any Litigation in the State of Delaware and Section 265, Judicial Code, Having No Application to Such Portion of the Decree.

The decision of the majority of this Court is based on its opinion that because of the provisions of Section 265 of

the Judicial Code the trial court had no power to enjoin petitioner from proceeding with certain suits instituted by it in the State of Delaware.

The ultimate decision is that the decree of the Circuit Court of Appeals be reversed. That decree provided *inter alia* (R. 721):<sup>1</sup>

"**f.** That said Phoenix Finance Corporation, its officers, agents, servants, attorneys and employees and all those acting by, through or for them and its successors and assigns, jointly and severally are commanded and ordered forthwith to satisfy, release and remove from the records of the Recorder's office of Allamakee County, Iowa, and from the records of the Registrar of Deeds of Crawford County, Wisconsin, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931, covering the property and assets of Iowa-Wisconsin Bridge Company, which said mortgage was filed for record and recorded in the office of the Recorder of said Allamakee County, Iowa, on or about the 2nd day of June, 1939, and recorded in Book L, pages 625, 626, and which was recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, on the 18th day of May, 1939, and recorded in volume 153, page 293, and that they deliver the original of said mortgage and note secured thereby for cancellation to the Clerk of this Court."

The mortgage which petitioner was thus required to satisfy, release and remove from the records was in no manner involved in any of the Delaware suits, prosecution

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<sup>1</sup>As in the briefs, where reference is made to the original or first record in this cause on the former petition for certiorari in this court by Phoenix Finance Corporation (No. 438, October Term, 1938), the letters "F. R." will be used in the reference, and the letters "F. R. Supp." in references to the supplemental volume thereof. Whenever reference is made to the record in the supplemental and ancillary proceedings here involved, the letter "R" will be used in the reference.

of which was sought to be enjoined, as will be readily ascertained from an examination of the supplemental and ancillary bill (R. 10, par. 11); the decree (par. 12, R. 712-713), and the pleadings in the Delaware cases (Exhibit S. C. 1, R. 294-301; S. C. 2, R. 301-307; S. C. 3, R. 307-319; S. C. 4, R. 320-339; S. C. 5, R. 340-373).

No reference is made in the opinion of the majority of the court to that portion of the decree, and none of the reasons assigned for the majority decision are applicable to it. The portion of the decree of the trial court referred to in this section of the petition was fully considered and passed upon by the Circuit Court of Appeals (R. 770, 780, 781).

The general rule is:

"The effect of a general and unqualified reversal of a judgment, order or decree is to nullify it completely and to leave the case standing as if such judgment, order or decree had never been rendered, except as restricted by the opinion of the appellate court."

5 C. J. S., p. 1476, Sec. 1950.

It was held in the Sixth Circuit, *I. T. S. Rubber Co. v. Tee Pee Rubber Co., Inc.*, 295 Fed. 479, 481, that where a decree of injunction had been entered enjoining two acts and upon review the decree was reversed and the case remanded, the entire decree was vacated and the entire injunction dissolved, although one question was not raised, considered or decided by the court.

Upon argument Mr. Justice Black inquired of counsel for petitioner whether if this Court should hold that the lower court had no jurisdiction to grant the injunction because of Section 265, Judicial Code, would such a holding affect that part of the injunction relating to the mortgage; to which counsel for petitioner replied that it would not; whereupon Mr. Justice Black stated that it seemed to him it would not affect that part relating to the mortgage.

We are mindful of this and of the statement in *Wolff Packing Co. v. Industrial Court*, 267 U. S. 552, 562, "judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided," but since the matter is not free from doubt and in order to avoid future complications we believe the opinion should specifically provide for the affirmance of this portion of the decree, regardless of what may be the final conclusion on petition for rehearing as to the matters specifically referred to in the decision of the Court.

The facts with reference to the portion of the decree in question, record history and record references were fully set out in respondent's brief in this case (pp. 6; 7; 12-13; 19; 21; 24; 38; 44-45; 53; 55; 57-58; 76; 79-81; 90; 122-124; 125-126), and in its supplemental brief (pp. 11-12).

Argument as to the applicable law was presented in respondent's original brief (pp. 205-208), and briefly in its supplemental brief at page 24.

See Court's Finding 8 R. 41, 42; Finding 26, R. 53-54; Finding 38, R. 62; Finding 40, R. 64, 65, and Decree R. 67.

We also call attention to the fact that by its petition for rehearing in the main case petitioner asked "that the decree be modified so as to withhold from adjudication the question of the validity of the \$50,000 mortgage given by the Bridge Company to petitioner, reserving the right to petitioner to litigate said mortgage in another action if it so desired (F. R. 223, par. 3), referring to allegations of supplemental and ancillary bill (R. 4, par. 3). This prayer of the petition was denied (F. R. 412-413). The findings of the lower court as to lack of consideration for and fraudulent character of the mortgage were affirmed by the Circuit Court of Appeals in its original opinion (R. 85; 89), and the order denying petitioner the right to have reserved from adjudication the question of

the validity of the \$50,000 mortgage specifically affirmed (R. 91-92).

As to the effect of litigating this question upon the petition aforesaid, see

*Spencer v. Watkins*, (8 C. C. A.) 169 Fed. 379,  
Cert. den., 215 U. S. 605.

If, as is conceded by the majority opinion in the instant case, the rule has become well settled that Section 265 does not preclude the use of injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court, certainly there can be no question as to the power of a federal court to issue an injunction against parties before it who seek to interfere with the title to property still in the custody of the court under receivership by recording an instrument which that court has held to have been void in its inception because of fraud and lack of consideration.

We, therefore, respectfully submit (without waiving the other grounds of this petition for rehearing), that the decision of this Court should be modified to affirm that portion of the decree of the Circuit Court of Appeals for the Eighth Circuit which affirmed paragraph (f) of the decree of the trial court commanding petitioner to satisfy, release and remove from the records the \$50,000 mortgage herein referred to (R. 721-722).

## II.

**The Court in Its Majority Opinion Has Overlooked the Fundamental Basis of Prior Decisions Upholding Federal Court Injunctions Prohibiting Parties from Relitigating in State Courts Matters Once Determined, Despite the Provisions of Section 265, Judicial Code; to-wit, That a Federal Court of Equity Has the Power to Issue Such Injunctions in Supplemental and Ancillary Proceedings to Effectuate Its Own Decrees, in Order to Avoid Relitigation of Questions Once Settled Between the Same Parties, or, As Other-**

**wise Expressed, to Secure or Preserve the Fruits and Advantages of a Judgment or Decree Rendered Therein.**

**A.**

**Foreword.**

Counsel for respondent realize the appearance of temerity involved in asserting that a majority of this Court has failed to properly interpret its decisions, and further realize how infrequently petitions for rehearing are granted by this Court, particularly where they have been so extensively argued and carefully considered as in the instant case. A strong sense of duty, not only to our client but to all litigants in the federal courts who may find themselves in a similar position and indeed to the national system of courts itself, however, requires that we call to the attention of the Justices as forcibly as possible, the fact that by the decision here involved a policy of this Court and a statutory construction, repeatedly announced since 1875, and consistently followed by the lower courts, have been reversed—and this without any expressed demand for such a change; in the face of acquiescence (if not express approval) by Congress in the policy and the construction, and without regard to the disastrous effect upon litigants.

To illustrate the last, in the instant case the litigation was started in August, 1933; the petitioner here through its representatives, the Trustees, chose the federal court as the forum; the case was heard before a master; it was tried before a district judge on the record and voluminous exceptions to the master's report; after decree petitions for rehearing and modification were filed and passed upon; an appeal was taken to the Circuit Court of Appeals; upon affirmance there certiorari was prayed and denied by this Court. The mandate of the Circuit Court of Appeals was finally entered on April 6, 1939. The record in the main suit consists of over 1,700 printed pages and this after a reduction of the testimony to narrative form.

Thousands of dollars were necessarily spent in the defense of the case. When petitioner, having been defeated at every stage of the proceeding, attempted relitigation by the commencement of numerous suits in Delaware and respondent, relying on the prior decisions of this Court, instituted these proceedings and they have been carried on for two years. Today we are told that all that has gone before during the past eight years has been for naught. The several hundred stockholders of respondent, who have been found to have been so outrageously cheated and defrauded by petitioner, its predecessors and officers, that even the judges of the Delaware court were impelled to say they wondered that the recital of the long and sordid story of financial manipulation and mismanagement which had characterized the history of the Bridge Company had been confined to reports of civil and equitable proceedings (14 Atl. 2d 386), are told they will probably lose everything they fought so long to save, because no person or corporation of moderate means can withstand such a continued *blitzkrieg* of relitigation. With the doors thrown wide open, any litigant who prevails in the federal court, whether he entered it himself or was brought in as was respondent, may be subject to the same disaster.

This is not a mere procedural matter. It is not a matter of such small consequence that theoretical criticisms by writers of law review articles should be taken as a guide for decision. It is a matter of vital importance in the practical administration of justice, and counsel for respondent most earnestly urge upon each Justice considering this petition the deepest and most careful reconsideration of the fundamental principles of equity, comity, justice—and common sense—involved, in the light of the decisions in which at least forty distinguished members of this Court have concurred during the past sixty-five years, to say nothing of the decisions of district courts and circuit courts of appeal which have interpreted those decisions as is contended for by respondent here, and have followed them.

## B.

**Classification of Decisions.**

In the majority opinion the prior decisions of this Court are so classified as to make it appear that "relitigation" cases are few in number, and that the principles announced in other cases upholding the right of injunction despite section 265<sup>2</sup> are not applicable to them. Such a classification, we respectfully submit, is not in accord with the basic holdings in the decisions.

## (1)

**REMOVAL CASES.**

In the majority opinion it is stated that Section 265 has always been deemed applicable to removal proceedings and that "the true rationale of these decisions is that the Removal Acts have *pro tanto* amended the Act of 1793."

Section 12 of the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73), after the provisions for a petition and bond on removal continued: "It shall then be the duty of the state court to accept the surety and proceed no further." Substantially this language has been carried down to the present time (Sec. 29, Judicial Code; U. S. C., Tit. 28, Sec. 72). Certainly it does not seem logical to say that Section 12 of the Judiciary Act of 1789 amended the Act of 1793 on the one hand, and on the other to assert that Section 14 of the same 1789 Act (Sec. 262, Judicial Code) was "obviously limited by the subsequent enactment of the specific prohibitory provisions of the Act of 1793." This Court has not previously so held, but on the contrary has said that the 1789 Act and the 1793 Act should be construed in connection with each other.

*Kline v. Burke Construction Co.*, 260 U. S. 226, 229.

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<sup>2</sup>This numbering of the Section will be used throughout this petition without reference to dates of decisions discussed.

See also *Sharon v. Terry*, often cited by this Court, 36 Fed. 337, 365.

*Dietzsch v. Huidekoper*, 103 U. S. 494, was not decided on the ground that there was any *pro tanto* amendment of Section 265 by the Removal Acts. The grounds for decision were these:

(a) A court of the United States is not prevented from enforcing its own judgments by a statute which forbids it to grant a writ of injunction to stay proceedings in a state court.

(b) The court had jurisdiction of *Dietzsch* and could enforce its judgment against him or those whom he represented.

(c) If the bill (for injunction) was not maintainable, judgment in favor of the appellees would settle nothing, but instead of terminating strife between them and their adversary, would leave them under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice.

(d) As the bill was filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect unless by a direct proceeding.

Nor does *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239, refer to any such distinction.

*Kline v. Burke Construction Co.*, 206 U. S. 226, in no manner involved the Removal Acts and throws no light on this particular question.

The grounds of decision stated in *French v. Hay*, 22 Wall, 250, 253, are referred to as "loose." Without repe-

tition of citations, we merely note that it has been cited in practically every case dealing with the question here involved and this holding has never been disapproved. It cannot be deemed a carelessly considered decision because it was written in connection with *French, Trustee, v. Hay et al.*, 22 Wall. 238, in which the general features of the litigation and the removal features were carefully considered. Appellant very specifically raised the objection under the 1793 Act, citing *Peck v. Jenness*, 7 How. 612, 625. The decision was based, not on any provision of the Removal Acts but on the grounds later restated in *Dietzsch v. Huidekoper*, *supra*, which have been summarized, and upon the ground that the prior jurisdiction of the federal court took the case out of the operation of the 1793 Act.

*Bryant v. Atlantic Coast Line R. Co.*, 22 F. 2d 569, 571, also cited, merely discusses the exception *obiter* and speculates as to a distinction not found in any decisions of this Court.

Finally, in the article by Taylor & Willis appearing in 42 Yale Law Journal 1169-1197, the authors say (Note 37, p. 1175):

“A prohibition against continuance of the action in the state court is *certainly not a repeal pro tanto of the prohibition against issuance of injunctions to prevent such continuance*” (Emphasis supplied).

## (2)

### CASES UNDER INTERPLEADER ACT.

*Treinies v. Sunshine Min. Co.*, 308 U. S. 66, 74, was based, insofar as the injunction was involved, on the Interpleader Act. *Dugas v. American Surety Co.*, 300 U. S. 414, is a “re-litigation case” and its decision was not based solely on the Interpleader Act. In the interpleader proceedings a permanent injunction had been issued

against any suit against the American Surety Company. The interpleader proceedings were closed by a final distribution. Dugas then brought suit in a Louisiana court against the New York Casualty Company, surety on an appeal bond furnished by American prior to the interpleader proceedings. After a judgment of dismissal, a reversal of that judgment and a remand for further proceedings, American secured a supplemental bill in the interpleader suit restraining Dugas from further proceeding in his suit against the New York Company. Dugas' counsel pointed out that the injunction in the interpleader suit did not directly forbid Dugas from suing on the appeal bond but only from instituting or prosecuting any suit against the American. With reference to that contention the court said:

"But the injunction, being only one part of the decrees, is not the exclusive criterion of what was determined and effected by them. Its purpose was to forestall anticipated departures and not to limit other provisions or restrict their operation and effect" (p. 427).

Then after reciting other provisions of the decree and holding that a supplemental bill might be brought in aid of and to effectuate the prior decree, while holding that the power of the court to enjoin Dugas had full support in Sections 2 and 3 of the Interpleader Act, the court added (pp. 28-29):

"As also under settled adjudications respecting power of the federal court to protect its jurisdiction and decrees," citing

*French v. Hay*, *Root v. Woolworth*, *Julian v. Central Trust Co.*, *Madisonville Traction Co. v. St. Bernard Mining Co.*, *Looney v. Eastern Texas R. Co.*, and *Wells-Fargo Co. v. Taylor*, referred to herein.

This decision in 1937, in view of the cases cited at last above set forth, demonstrates clearly that this Court

has always based its exceptions to Section 265 on the right of the court to protect its jurisdiction and decrees, regardless of the nature of the particular case before it.

In the majority opinion, the Interpleader Act of 1926, *supra*, the Limitation of Ship Owners' Liability Act of 1851 and the Frazier-Lemke Act are referred to as containing statutory qualifications of Section 265 and as implied legislative amendments of it.

We respectfully submit a correct statement should be that the provisions of those Acts which either directly or inferentially authorize the issuance of injunctions against proceedings in state courts were supplementary to the provisions of Section 265 as construed by this Court.

Concededly under the doctrine of comity, this Court had always held that where a state court first properly acquired jurisdiction, the federal courts might not interfere with its proceedings by injunction.<sup>3</sup>

By the Limitation of Ship Owners' Liability Act it was provided that upon transfer to a trustee for the benefit of the claimants of the interest of an owner in a vessel "all claims and proceedings against the owner or owners shall cease." 9 Stat. 635, 636. This referred as well to claims already in suit in state courts as to those not yet sued upon, and the Act was held to extend the power of the federal courts to enjoin even in those cases—an extension of the power given by Section 265 as construed. This was recognized in *Providence & N. Y. S. S. Co. v. Hull Mfg. Co.*, 109 U. S. 578, cited in the majority decision.

So with the Interpleader Act. Injunctions which may be issued under that Act are not limited to cases in which the federal court has first acquired jurisdiction, but may be used to enjoin pending proceedings in a state court. See *Treinies v. Sunshine Min. Co.*, *supra*.

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<sup>3</sup>*Diggs v. Keith & Wolcott*, 4 Cranch 179; *Peck v. Jenness*, 7 How. 612; *Watson v. Jones*, 13 Wall. 679.

The Frazier-Lemke Act also in terms prohibits the maintenance of proceedings "if instituted at any time prior to the filing of a petition."

The expressions of Congress to these statutes, therefore in no manner disapproved the construction which had been given Section 265, but, recognizing that construction and the limitations of it, extended the powers of the federal courts as to injunctions against parties proceeding in state courts to cases where the state courts had priority of jurisdiction. The purpose of each Act is plain, and equally plain is the object of Congress, which was to confer upon the federal courts a power which had not yet been given them under this Court's construction of Section 265 nor under the original Bankruptcy Act, to-wit, the power to permit the enjoining of parties *already* in the state courts from further proceeding there in order that all the claims, secured and unsecured, against the debtor or to a fund might be brought into one proceeding in one court, dealt with at one time, and all relative rights and priorities determined there.

### (3)

#### INJUNCTION IN CASES INVOLVING RES.

The majority opinion states that the rule has become well settled that Section 265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court. That is true, but there is no justification for such a holding under a literal interpretation of Section 265, nor is there any justification for upholding the exception in *res* cases and disregarding the exception which has been recognized in other cases.

The so-called "*res*" decisions do not, except in a few instances, rest upon the theory of preventing contests between the representatives of two distinct judicial systems over the same physical property, which might give rise to actual physical friction. That situation does arise

—not in cases where the injunction is granted to effectuate a prior decree of the court and secure or preserve fruits or advantages of a judgment or decree—but where two actions are pending simultaneously, but one court has first secured actual or constructive possession of the physical property.

It was such situations which the court was discussing in *Kline v. Burke Construction Co.*, 260 U. S. 226. In that case two actions *in personam* involving the same issue, were pending simultaneously in state and federal courts. Before final judgment in either, the federal court issued an injunction restraining the plaintiffs in the state court from proceeding. No question of relitigation was involved. The Circuit Court of Appeals had been of the opinion that the Burke Company was entitled to have a trial and adjudication by the federal court, and that as the second suit might be prosecuted so as to secure an adjudication in the state court before the action in the federal court could be adjudicated, then the federal court's adjudication would be made futile. This Court held that the Burke Company had no such constitutional right. Its discussion as to custody of the *res* was limited to those cases in which courts of equal rank are attempting to proceed and one of them has taken into its jurisdiction a specific thing, in which case the rule is applied that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction, and it was stated that this particular rule would not apply where both co-pending actions were *in personam* without a judgment having been entered in either. The court did not pass upon the situation which exists here where the action in the federal court has proceeded to decree and the injunction is in aid of that decree. This distinction has been made by this court in *Local Loan Co. v. Hunt*, 292 U. S. 234.

In *Farmers Loan & Trust Co. v. Lake St. R. Co.*, 177 U. S. 51, the federal court had acquired jurisdiction of the

res by the commencement of foreclosure proceedings before the commencement of similar proceedings in the state court.

In *Lion Bonding Co. v. Kratz*, 262 U. S. 77, the state court had possession of the property of an insurance company at the time a receiver was appointed in federal court and it was held entitled to retain it.

These cases, however, are not such *res* cases as are here in point and which are not distinguishable from what the majority opinion terms "relitigation cases."

In *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188, a foreclosure decree had been entered, a sale had and conveyance made. Thereafter a suit was commenced in an Alabama court attacking the foreclosure proceedings. Injunction was asked against this suit. Mr. Brandeis for the appellant squarely contended that regardless of whether the suit had been terminated or not, the petitioner was entitled to bring an ancillary bill (Brief in support of petition for rehearing, No. 194, October Term, 1904, p. 26), and that the provisions of Section 720 had no application where an injunction was sought in order to enable the court fully to exercise its jurisdiction (Petitioner's brief, s. c., p. 45). Counsel for the respondent contended flatly that "the objection that the Circuit Court of the United States cannot enjoin proceedings in the state court is an objection which cannot be surmounted," and that the remedy of the parties was to allow the proceedings to pass to judgment and if the highest court of the state should not decree in their favor, then carry the case by writ of error to the Supreme Court of the United States (Respondent's brief on certiorari, s. c., p. 71 *et seq.*).

This Court did not base its decision on the ground of avoidance of conflict between courts over the custody of property but on the ground that a federal court "may protect the title which it has decreed as against everyone, a

party to the original suit and prevent that party from relitigating the questions of right which had been determined," and that "the jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid relitigation of questions once settled between the same parties is well settled" (p. 195).

The court cited with approval *Julian v. Central Trust Co.*, 193 U. S. 93, referred to in both opinions here. In that case the proceedings in the federal court had ended. The court no longer had anything to do with the property (In the instant case the property is still in the court's possession). Nevertheless this Court held that it was within the competency of the federal court to restrain the action in the state court in order to protect the title it had conveyed by the foreclosure proceedings.

*Local Loan Co. v. Hunt*, 292 U. S. 234, might be termed a *res* decision to the extent that the Court says: "And generally proceedings in bankruptcy are in the nature of proceedings *in rem*." However, there was no property in the hands of the federal court at the time of the institution of the state action. The discharge had been granted. There could be no physical conflict. This Court merely upheld the right of the federal court to "secure or preserve the fruits and advantages of the judgment or decree" and this notwithstanding the provisions of Section 265. What were the fruits and advantages of the judgment or decree there entered and protected? Not the bankrupt's title to the wages which were sought to be subjected to the state action, because they were never in the possession of the bankruptcy court not having been earned prior to the discharge. What the bankruptcy court by its decree had done was to relieve the debtor of his indebtedness. What the courts did in the main case here was to determine that the bridge company was not indebted to Phoenix for the amounts claimed as considerations for the various groups of bonds, which are now

involved in the Delaware cases. In the Local Loan case by virtue of the statute the party seeking injunctive relief had been adjudged free of the debt involved, and it was to preserve the advantage of that decree that the injunction was there granted and upheld. In the instant case the bridge company under the evidence has been adjudged not indebted to petitioner, and it is that advantage of the decree which the injunction here seeks to protect.

## (4)

#### INJUNCTIONS TO RESTRAIN JUDGMENTS FRAUDULENTLY OBTAINED.

While impliedly criticising those decisions upholding the right of the federal courts to enjoin litigants from enforcing judgments fraudulently obtained in state courts, the majority opinion does not deny their existence. The reason for their decision is not as strong as those permitting injunctions in relitigation cases. The importance of these decisions lies in the fact that each of them reiterates in one form or another the recognized exception stated in the summary in *Wells-Fargo v. Taylor*, 254 U. S. 175, 183, as follows:

"It has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent (the federal court) from maintaining and protecting its own jurisdiction properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in state courts."

## (5)

#### "RELITIGATION CASES."

Under this head we discuss particularly the cases referred to in the fourth and fifth sections of the majority opinion. The classification, however, should not be limited to them.

*Dietzsch v. Huidekoper* and *French v. Hay*, *supra*, classified as "removal cases," should properly be considered in the present classification, because in each case a decree had been entered in the federal court, an attempt was being made to proceed in a state court, and the injunction sustained was granted to prohibit the party defeated in the federal court from so proceeding. The basis of decision in each case has been discussed.

*Dugas v. American Surety Co.*, *supra*, classed as an interpleader case, was obviously a relitigation case.

*Julian v. Central Trust Co.*, *Riverdale Mills v. Manufacturing Co.* and *Local Loan Co. v. Hunt*, *supra*, classed as "res" cases, were also "relitigation" cases within any limitations of that term, and the decisions were not based on the rule of comity referred to in *Kline v. Burke Construction Co.*, *supra*.

*Gunter v. Atlantic Coast Line*, 200 U. S. 273, is referred to in note 7 to the majority opinion as a case which need not be considered. As pointed out in the dissenting opinion, it is obviously a relitigation decision. The original suit was in the federal court and a decree had been entered. State taxing officials had appeared. Thirty years later suit was commenced by state officers in a state court. Injunction was asked based on the former decree in the federal court. Both the Eleventh Amendment and Section 720 were set up as defenses. Appellee relied on *Garner v. Second National Bank*, 67 Fed. 833, and on *Sharon v. Terry*, *French v. Hay* and *Dietzsch v. Huidekoper*, *supra*, among other cases (Appellee's brief No. 88, October Term, 1905), and stood on the proposition that a federal court might issue an injunction to enforce and protect its own judgments. This Court, speaking through Mr. Justice White, said that the matter was not open to discussion, citing *Dietzsch v. Huidekoper* and *Julian v. Central Trust Co.*, *supra*, and *Prout v. Starr*, 188 U. S. 537.

The majority opinion in note 9 states that *Root v. Woolworth*, 150 U. S. 401, is erroneously regarded as illustrating the "relitigation" exceptions to 265. True no litigation had yet been commenced in the state courts but there had been a decree in the federal court, and it was alleged as a ground for injunction that the petitioner would be subjected to multiplicity of suits and that defendant threatened the institution of divers actions unless restrained. It is further pointed out in the dissenting opinion that the supplemental decree enjoined the defendant from bringing any action or actions touching the title to or possession of the premises involved. It states the rule which has since been followed by this Court that "the jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties is well settled."

The majority opinion also states that *Looney v. Eastern Texas R. Co.*, 247 U. S. 214, is not a relitigation case. While as pointed out by Mr. Justice Reed in the dissenting opinion, the supplemental injunction was technically in aid of a temporary injunction rather than a final decree, it requires only a reading of the last paragraph of the opinion to demonstrate that this Court was making no such distinction and was following the same reasoning which it has consistently followed in all the cases above referred to. The assignments of error directly raised the point that the injunction was in violation of Section 265 (No. 756, October Term 1917, R. 571). The specifications again raised the point (s. c., Appellant's brief pp. 33-40). In arguing the proposition the appellant virtually conceded that relitigation cases constitute an exception to the literal language of Section 265, but claimed that the same matter was not involved in the state litigation as was involved in the first injunction proceeding (s. c., Appellant's brief pp. 41-44). The appellee argued directly that the court having acquired jurisdiction of the parties

"had the right in the protection of the jurisdiction thus acquired to enjoin the prosecution in the state court of a suit which undertook to deal with the same subject matter," citing

*French v. Hay,*  
*Dietzsch v. Huidekoper,*  
*Gunter v. Atlantic Coast Line,* and  
*Julian v. Central Trust Co., supra,*

among other cases.

While, as has just been pointed out, at least eight of the leading cases discussed herein were in fact relitigation cases, *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, is singled out as an illustration of the weakness of respondent's contention, because the decision as to Section 265 is in one sentence and cites only the *Looney* case, including, however, the cases therein cited. The fact is whether the opinion be short or long, the question as to the bar of Section 265 was squarely raised by the motion to dismiss (No. 274, October Term, 1920, R. 151), was fully presented by the appellant's brief (Appellant's brief, s. c., pp. 22-23), and was squarely decided.

The case of *Hale v. Bimco Trading Co.*, 306 U. S. 375, was cited and commented upon in respondent's supplemental brief (pp. 41-42). No reference to it, except as a comparison case (note 7), is made in the majority opinion.

We respectfully submit that the majority opinion in the instant case is in conflict with the decision of this Court in the *Hale* case.

While the injunction in that case did not prohibit anyone from proceeding with the Florida mandamus case, it did most effectively nullify proceedings of the state court by enjoining the state officers from enforcing the statute in question. The fact that the moving parties in the mandamus suit and in the injunction suit were different is immaterial. The practical effect was that by the decree of the federal court the proceedings in the state

court were made ineffectual. Neither can it make any difference that the Florida Supreme Court stayed its proceeding pending final decision of this Court in the injunction proceedings. If Section 265 is to be construed literally, there can be no waiver by a state court affected.

The state officers protested virogoously that the injunction was a violation of Section 265, and cited, among other cases, *Dial v. Reynolds* and *Peck v. Jenness, supra*, to support their position (Appellant's brief, No. 418, October Term, 1918, pp. 11-17).

Counsel for appellees argued that the case came within certain of the well recognized exceptions to Section 265 as well as that the section does not apply after a final order has been made in the state court (Appellant's brief, s. c., pp. 13-16).

The decision of this Court in that case, by sustaining the injunction, admitted the propriety of departing from a literal construction of the statute and in effect said that the purpose was to avoid needless friction between two systems of courts having potential jurisdiction over the same subject matter, and it not being necessary to bring that safeguard into play, there was no occasion for disturbing the injunction.

We respectfully assert that the case at bar presents a situation where it is much less necessary to bring the safeguard referred to into play, and that in fact the construction of Section 265 in the majority opinion in the instant case will make for rather than avoid the needless friction referred to in the Hale opinion.

The majority opinion makes no reference to *Prout v. Starr*, 188 U. S. 537, except to say in note 9 that the "first come, first served" rationale of cases like that was discarded in *Kline v. Burke Construction Co., supra*.

A careful reading of that case discloses that it was not a *res* case and was clearly a relitigation case. As stated in the dissenting opinion of Mr. Justice Reed, the federal court stipulation for a decree to conform with the

decree in a similar case was treated as a decree, and the subsequent action by the Attorney General in the state court was treated as an attempt to relitigate the issues which had been determined in the federal court. No question of *res* was involved. The court said:

"The object of the supplemental bill was to restrain the present appellant as successor to Smyth from attempting to transfer the very matters that stood for judgment in the federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this Court."

The principle here contended for by respondent was settled as early as 1810 in *Mocher v. Reed*, 1 Ball & B. 318 (Ir. Ch.), in a case where the plaintiff having proceeded for some time before a master in chancery, filed a declaration in the court of common pleas for the same matter. The Lord Chancellor said:

"After the plaintiff has obtained a decree to account he is not at liberty to dismiss the bill; having got the relief he prayed, his election is made, and he cannot afterward proceed at law; besides, how utterly inconsistent with the ends of justice it would be, to permit him to proceed in this court and at law at the same time for the same demand; for the jury may find a verdict one way and the master make a report a different way, which would occasion such a clashing of jurisdiction as never could be endured."

This case is denominated the leading case in *Garner v. Second National Bank*, (1st C. C. A.) 67 Fed. 833, cert. denied 163 U. S. 688, where the court said:

"It is now so thoroughly settled that this provision of law (Sec. 720, R. S.) does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceedings in a state court, that the proposition needs no discussion by us."

The Garner case has been conceded leading in the circuits and by numerous district courts. See *Iron Mountain R. Co. v. City of Memphis*, (6 C. C. A.) 96 Fed. 113, 131; *Massie v. Buck*, (5 C. C. A.) 128 Fed. 27, 30; *Berdie v. Kurtz*, (9 C. C. A.) 75 F. 2d 898, 905. It was also relied upon in several of the briefs referred to *supra*, and as pointed out in the dissenting opinion, listed as an authority on 265 at the time of the 1911 revision of the Judicial Code.

In the Mocher case as in the Garner case a party sought to institute a suit at law while the equity suit was pending, and was promptly enjoined, not because of any conflict over the *res* but because such action would be "utterly inconsistent with the ends of justice." What is the difference between such a situation and one where the party waits until the equity suit is concluded and then, finding himself defeated, attempts to retry the case in a court of law?

(5a)

#### DIAL V. REYNOLDS.

The majority decision is apparently based on *Dial v. Reynolds*, 96 U. S. 340. It is the only decision of this Court since 1875 even hinting at a literal construction of Section 265.

The case is not even in point.

- (a) The injunction was not sought to effectuate any decree.
- (b) It was not a relitigation case.
- (c) It was a case in which the state court had first acquired jurisdiction.

These statements find full support in the history of the case. Judgment had gone *in favor of Reynolds* in an ejectment action brought by him against Cooper in the Circuit Court for the Eastern District of Tennessee

upon writ of error sued out by Cooper. This Court had reversed the judgment and ordered a new trial. *Cooper v. Reynolds*, 10 Wall. 308. Reynolds then dismissed the case in the federal court and instituted a new ejectment action in the state court. *Dial v. Reynolds* was then instituted as a new suit by Dial and another as trustees under a deed of trust given by Cooper, asking foreclosure of the deed of trust, that the title of the trustees be quieted, and that Reynolds be enjoined from further prosecuting his action of ejectment.

(a) The injunction was not sought to effectuate any decree, because there was none to effectuate. The only decree ever entered in the federal court was in favor of Reynolds and that had been reversed and a new trial ordered.

(b) It was not a relitigation case because the matter involved had not theretofore been fully litigated. It certainly had never been finally determined in favor of Cooper or his trustees. The reversal did not carry with it directions for judgment in favor of Cooper. It merely ordered a new trial, and Reynolds having dismissed without a new trial, the case went out of existence without any final adjudication.

(c) The decision cites *Diggs v. Wolcott*, 4 Cranch 179, *Peck v. Jenness*, 7 How. 612, and *Watson v. Jones*, 13 Wall. 679. These decisions, as was pointed out in the memorandum furnished the Justices after argument, and as was pointed out by this Court in *Hull v. Burr*, 234 U. S. 712, 727, and *Simon v. Southern Ry. Co.*, 236 U. S. 215, regardless of the bald statements they made as to the statute, all involved cases where the first action had been taken in the state court. Such was the case in *Dial v. Reynolds*. With *Reynolds v. Cooper* dismissed without final adjudication, the new ejectment suit in the state court was prior in time to the foreclosure suit and no question of any exceptions to the statute was involved.

It should be remembered that Mr. Justice Swayne, who wrote the opinion, had written the opinion in *French v. Hay*, *supra*, and in *Dial v. Reynolds* gave no indication of any intention to recede from the prior decision, and all but one Justice sat in both cases. A majority of the Justices who sat in *Dial v. Reynolds* sat in *Dietzsch v. Huidekoper*, *supra*, in which not only was the ruling in *French v. Hay* specifically reaffirmed, but no mention made of *Dial v. Reynolds*. Among these was Mr. Justice Field, who later wrote the opinion in *Sharon v. Terry*, *supra*, and Mr. Justice Harlan, who participated in every case from *French v. Hay* up to and including *Gunter v. Atlantic Coast Line Co.*, (1906) *supra*, and wrote the opinion in *Madisonville Traction Co. v. St. Bernard Mining Co.*, (1905) *supra*.

The case has been seldom cited and never in support of a literal construction of the statute. It is referred to in *Wells-Fargo v. Taylor*, *supra*, but after being cited, the recognized exceptions are set forth.

We respectfully submit that *Dial v. Reynolds* is indeed a most fragile foundation for a decision by which this Court turns its back upon an unbroken line of decisions for sixty-five years.

### C.

#### **Injunction Against Parties Not a Restraint of the Court Itself.**

No reference is made in the majority opinion to *Steelman v. All-Continent Corp.*, 301 U. S. 278 (1937), and to the cases therein cited, holding (p. 290):

“We are unable to yield assent to the statement of the court below that ‘the restraint of a proper party is legally tantamount to the restraint of the court itself.’”

In support of this statement by Mr. Justice Cardozo were cited numerous cases.

True, in the *Steelman* case there was involved a decree of a federal court enjoining the prosecution of a suit

in another federal court, and Section 265 was not involved. However, the Circuit Court of Appeals had found that the institution of an injunction suit in the New Jersey federal court was an attempt to oust the Pennsylvania federal court of a previously and validly acquired jurisdiction, so the question decided as just set out was directly in issue. This Court found support for the injunction by analogy in *Local Loan Co. v. Hunt*, *Kline v. Burke Construction Co.* and *Looney v. Eastern Texas R. R. Co.*, *supra*. It was definitely stated in the opinion that the decision was not based upon any interference with the *res*—and much argument had been made on that. What the Court said there of the trustee might well be applied to respondent here:

“He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession or in the possession, actual or constructive, of the court that appointed him. \* \* \* What he seeks is an injunction directed to a *suitor* and not to any court upon the ground that the *suitor* is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong” (Emphasis supplied).

The holding of this Court in the Steelman case is amply supported by the authorities cited, is consistent with reason and common sense and should not be overruled at this early date.

#### D.

##### Exceptions Imbedded in Section 265 by Judicial Construction.

We most respectfully assert that the statement in the majority opinion, “that apart from congressional authorization only one ‘exception’ has been imbedded in Sec. 265 by judicial construction, to-wit, the *res* cases,” is not borne out by the decisions cited in the opinion and briefly analyzed in the petition. We feel satisfied after a painstaking re-reading of the decisions, and in many cases of

the briefs of counsel in this Court, that if each Justice who joined in the majority decision will carefully re-examine the cases here discussed, he will find that in practically every one the decision has been bottomed not on the basis of preventing interference with the possession of the *res* by the court granting the injunction but on principles of comity, and on the basis of securing to the successful party the fruits and advantages of the decree and preventing relitigation of questions once decided, and that it is actually the relitigation exception which has been most firmly imbedded in Section 265.

### E.

#### **Stare Decisis.**

After a rereading of every case cited in both the majority and the dissenting opinion and a reading of the cases referred to in Mr. Warren's article not referred to in the opinions, we believe it can be confidently asserted that this Court and the great majority of the courts below following it, have never denied the right of federal courts of equity to enjoin proceedings in state courts necessary to maintain and protect their jurisdiction, make effectual their decrees and preserve and protect the rights of litigants, and have never given a literal interpretation to Section 265, except in the few cases where the state courts first acquired jurisdiction or where actions *in personam* were pending contemporaneously.

A principle of law has therefore been settled by a series of decisions which is binding on this Court and the lower federal courts and which should be followed under the rule of *stare decisis*. 21 Corpus Juris, Sec. 302. The fact that some cases were based on one state of facts and some on another does not alter the general principle which has been established.

To say that it is a denial of reality to suggest that litigants have shaped their conduct in reliance upon some loose talk in past decisions in the application of Section

265 is to say that the circuit courts of appeal which have considered the principle established and which is here contended for, have not comprehended the prior decisions of this Court and that this Court was in error in denying certiorari in the first Toucey case.

The principle underlying the rule of *stare decisis* was well stated by Justice Swayne in *Gilman v. City*, 70 U. S. 713, 724:

"It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Misera est servitus ubi lex est vaga aut incerta.*"

See, also, *Walling v. Bown*, 9 Idaho 740, 2 Ann. Cas. 720, and cases cited.

The respondent had property rights established by the original decision of the district court, affirmed by the circuit court of appeals, with certiorari denied by this Court. *Deposit Bank of Frankfort v. Board of Councilmen of City of Frankfort*, 191 U. S. 499. It was declared free of the claims of petitioner. It had a right to proceed to carry on its business in reliance upon the finality of that decree. It had the right under the decisions of this Court to expect that its rights would be protected by injunction if necessary, and it has spent two years of time and much money in attempting to secure the protection which has heretofore been given litigants in like situations. This Court under every sound interpretation of the doctrine of *stare decisis* should give it that protection. Certainly a change of policy should not be made retroactive so as to deprive respondent of rights it possessed under settled law when the decree was entered in its favor. A decision of this Court should not be retroactive any more than legislation may be *ex post facto*. If a change of policy is deemed advisable, that should be accomplished through

legislation and not by a reversal of judicial construction, with proper saving clauses such as were placed by Congress in the Act of May 14, 1934, and the Act of August 21, 1937.

In this case there is no "new experience" in the light of which the former decisions should be reconsidered.

The recommendation contained in Attorney General Edmund Randolph's report to Congress of December, 1790, on the Judiciary Act of 1789, related to an injunction to a judgment at law of a state court, and from his note accompanying the report it is very clear that it related to cases first commenced in the state courts (American State Papers V. 1, Misc. No. 17, p. 26 and p. 34, Note 8).

On August 9, 1792, Chief Justice John Jay and associate justices wrote the President concerning a representation to Congress in which they stated that the task of holding 27 circuit courts a year in different states from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, were too burdensome and more than they could physically bear, and called attention to the fact that the Supreme Court ought to be a separate tribunal, and in effect that the members of the Supreme Court should be relieved entirely of their duties of holding various sessions of the circuit courts, so that they might not be called upon to correct in one capacity the errors which they themselves might have committed in another. The letter and representation contained nothing with respect to the granting of injunctions to judgments at law or actions in state courts (American State Papers V. 1, Misc. No. 32, pp. 51-53).

This court's decisions have been in line with Attorney General Randolph's recommendation holding that Judicial Code, Section 265, relates to actions first commenced in the state courts and not to cases where the prior jurisdiction of the federal court has been invoked.

Judicial Code, Section 265, contains the words "\* \* \* by any court of the United States \* \* \*," which includes the district courts, the circuit courts and this court. This court from the beginning has consistently held that the

federal courts have the power to enforce their decrees and to issue all necessary writs to carry them out and to make them effectual.

*McKim v. Voorhies*, 7 Cranch 279 (1812).

*Wayman et al. v. Southard et al.*, 10 Wheat. 22-23, 6 L. Ed. 253, 258 (1825).

*United States v. Keokuk*, 6 Wall. 518-520, 18 L. Ed. 918.

*United States v. Johnson County*, 6 Wall. 166.

There is nothing new with respect to the origin of Judicial Code, Section 265. Everything now advanced with respect to it was known to the judges of this court when the section was previously construed, and probably more, as the earlier decisions were much nearer in point of time.

In *United States v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768 (January 13, 1868), this court stated: "Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree (Citing). Expressed determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied." Also see *Root v. Woolworth*, 150 U. S. 401.

## F.

### Congressional Approval and Acquiescence.

Respondent respectfully submits that the majority of this Court has failed to follow its settled decisions as to the construction to be placed upon a statute where it has been reenacted without change after judicial interpretation, and that the reenactment of Section 265 in the Judicial Code of 1911, in the light of the decisions, neces-

sitates the interpretation approved in the dissenting opinion and contended for by respondent here.

Congress restated Section 265 in the Judicial Code of 1911 without change, and in the light of *French v. Hay*, *Dietzsch v. Huidekoper*, *Julian v. Central Trust Co.*, *Sharon v. Terry* and *Garner v. Second National Bank*, *supra*, together with other cases. In those circumstances the rule laid down by this Court is plain and inescapable.

*Sessions v. Romadka*, 145 U. S. 29, 42.

*Camp v. Gress*, 250 U. S. 308, 315.

In the last cited case the court had under consideration Section 51 of the Judicial Code, and said:

"If Congress, in reenacting the provisions of Sec. 51, had intended that it should establish a rule with reference to defendants resident in different states contrary to the construction placed by the overwhelming weight of authority upon the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language."

*Heald v. District of Col.*, 254 U. S. 20, 23:

"\* \* \* the settled rule that where provisions of a statute had prior to their reenactment a settled significance, that meaning will continue to attach to them in the absence of a plain implication to the contrary."

*Julian v. Manhattan Ry. Co.*, 289 U. S. 479, 500:

"\* \* \* as this Court has often pointed out reenactment operates as an implied legislative approval of the prior construction—in other words, as a reenactment of the statute as before construed."

In this connection we submit that the court inadvertently overlooked the expressions of acquiescence by Congress in the exceptions to Section 265 which had been recognized by this Court, as evidenced by the provisions of the Act of June 16, 1910, Ch. 309, Sec. 17, 36 Stat. 557; Act of May 14, 1933, Ch. 283, Secs. 1 and 2, 48 Stat. 775; Act

of August 21, 1937, Ch. 276, Secs. 1 and 2, 50 Stat. 738, discussed at pages 44-46 of respondent's supplemental brief.

### G.

#### **The Importance of Supporting Power of Federal Courts to Prevent Relitigation.**

In the "Foreword," *supra*, respondent has endeavored to present a brief picture of the result to litigants of abandoning that construction of Section 265 which permits the federal courts to protect their decrees and prevent relitigation.

No one can point to any decision of state courts complaining of the construction here contended for. The state courts themselves have consistently upheld their right to enjoin parties from suing in federal courts,<sup>4</sup> and this Court has upheld that right in *Lida, Princess, v. Thompson*, 305 U. S. 456.

To say that a federal court shall have the right to effectuate and protect its own decrees and preserve the rights of litigants before it by injunction is to do no more than to uphold the rights, dignity and standing of that court as one of equal rank and standing with the state courts. It is in accord with the following statement of the desirable aims of legislation regulating the organization of federal courts by Mr. Felix (now Mr. Justice) Frankfurter in Volume 38, *The New Republic* April 24, 1939:

"To make the fullest use of our judicial resources, to simplify as much as possible the inequitable complexities of a system of courts spanning a continent, to secure a fair balance between federal system and

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<sup>4</sup>*Akerly v. Vilas*, 15 Wis. 401; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238; *Karcher v. Burbank*, 303 Mass. 303, 311; *In re Dawley*, 99 Vt. 306; *Connecticut Mut. Life Ins. Co. v. Merritt-Chapman-Scott Corp.*, 19 Del. Ch. 103.

state judiciaries, to maintain the authority of the federal courts through the prestige of its judges, to relieve the Supreme Court from all obstructions to the performance of its duties as the ultimate tribunal in our federalism."

Certainly to strip the federal courts of their power to effectuate their own decrees will not simplify but will add to the complexities of our judicial system; will upset the balance between the federal system and state judiciaries by denying to the federal courts equitable powers recognized as belonging to the state courts; will destroy rather than maintain the authority of the federal courts, and while it may not obstruct this Court in the performance of its duties, it will certainly add to those duties in such a case as this, where the Court may be called upon to review five state court decisions involving one main proposition, where the whole matter can in this suit be disposed of at one time.

Even Mr. Warren in his article "Federal and State Court Interference," 43 Harvard Law Review 345, 368, 369, several times referred to in the majority opinion, admits that the decisions of this Court, while amounting in his personal opinion to a "grafting" upon the Act of 1793, have been "undoubtedly promotive" of "complete justice" and preventive of "unseemly conflict of authority."

### III.

**The Court in Its Opinion Failed to Consider the Question of the Jurisdiction of the Federal Court As a Court of Equity to Restrain a Party Before It from Subjecting His Adversary to a Multiplicity of Suits.**

In the majority opinion no reference is made to the specific situation involved in the instant case where respondent is threatened with five separate suits in Delaware, all involving the common question as to what was determined and adjudicated in the main case. This mat-

ter was presented to the Court in respondent's brief appearing at pages 181-187, and in its supplemental brief at pages 30-35. We feel that the equitable questions alleged are entitled to consideration and in and of themselves warranted the granting of the injunction here involved.

#### IV.

##### **Conclusion.**

The majority opinion concludes:

"We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation."

May respondent in all earnestness and with the deepest respect suggest that the Court should likewise be scrupulous in sustaining the rights, dignity and standing of the national courts as being of equal rank and standing with the state courts, and in its regard for the rights of litigants; particularly those who were brought into the national courts and required there to defend their rights; to the end that justice may be done.

#### V.

##### **Prayer.**

For the foregoing reasons it is respectfully urged:

(1) That the decision of this Court be modified to affirm that portion of the decree of the Circuit Court of Appeals for the Eighth Circuit which affirmed paragraph (f) of the decree of the trial court commanding petitioner to satisfy, release and remove from the records the \$50,000 mortgage referred to in the record:

(2) That as to the remainder of the decree, this petition for rehearing be granted and that the decree of the

Circuit Court of Appeals for the Eighth Circuit be, upon further consideration, in all things affirmed.

Respectfully submitted,

FRED A. ONTJES,

WILLIAM C. GREEN,

*Counsel for Respondent.*

I, the undersigned, one of the counsel for the above named respondent, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

FRED A. ONTJES.